

# IOWA DEPARTMENT OF NATURAL RESOURCES

## ADMINISTRATIVE CONSENT ORDER

IN THE MATTER OF:	ADMINISTRATIVE CONSENT ORDER
DOUGLAS CHALUPA	NO. 2011-FP-001
WASHINGTON COUNTY, IOWA	

**TO:** Douglas Chalupa  
2706 Sockum Ridge Road  
Washington, IA 52353

### I. SUMMARY

This Administrative Consent Order (Order) is entered into between the Iowa Department of Natural Resources (DNR) and Douglas Chalupa for the purpose of resolving issues regarding Mr. Chalupa's unauthorized flood plain construction. In the interest of avoiding litigation, the parties have agreed to the provisions below.

Questions regarding this Order should be directed to:

**Relating to technical requirements:**

Paul Brandt  
DNR Field Office #6  
1023 W. Madison  
Washington, IA 52353-1623  
Ph: (319) 653-2135

**Relating to legal requirements:**

Randy Clark, Attorney II  
Iowa Department of Natural Resources  
Henry A. Wallace Building  
Des Moines, Iowa 50319-0034  
Ph: (515) 281-8891

**Payment of penalty to:**

Iowa Department of Natural Resources  
502 E. 9<sup>th</sup> Street  
Des Moines, Iowa 50319-0034  
Attn: Randy Clark

### II. JURISDICTION

This Order is issued pursuant to Iowa Code §455B.279 which authorizes the Director to issue any order necessary to secure compliance with or prevent a violation of Iowa Code §§455B.261 through 455B.281 or the rules adopted pursuant thereto, and Iowa Code §455B.109 and 567 Iowa Administrative Code (IAC) Chapter 10, which authorize the Director to assess administrative penalties.

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**III. STATEMENT OF FACTS**

1. Douglas Chalupa owns real property on the west side of West Fork Crooked Creek and the south side of Sockum Ridge Road, generally described as a portion of the NE¼ of the NW¼ of Section 13, T74N, R7W, Washington County, Iowa. West Fork Crooked Creek flows adjacent to this property and drains approximately 120 square miles at this location.

2. By letter dated November 7, 2005, DNR Field Office #6 (FO6) staff notified Mr. Chalupa that the east end of the levee on his property, along and parallel to the county road ditch, appeared to violate the required 190 foot separation distance from the west bank of West Fork Crooked Creek.<sup>1</sup> Mr. Chalupa was directed to check the separation distance, remove any portion of the levee located within the required separation distance and contact FO6 by November 30, 2005 to report the status of the levee. Subsequently, Mr. Chalupa questioned the need for the separation distance and FO6 responded by sending him a Notice of Violation by letter dated April 6, 2006. This letter explained the historical basis for the separation distance, enclosed a drawing with specifications for Mr. Chalupa's levee, and directed him to remove any portion of the levee located within the required separation distance and to document the removal by June 30, 2006.

3. By letter dated January 26, 2009, FO6 further explained the history of the 190 foot separation distance, notified Mr. Chalupa that he violated Iowa law by expanding the levee without DNR approval and directed Mr. Chalupa to submit, within 10 days, a letter stating his intentions regarding the levee. Mr. Chalupa responded by stopping at the FO6 office on January 30, 2009; he agreed to remove the unauthorized levee expansion and filed a complaint against a neighboring landowner for piling dirt and grubbed trees along and near West Fork Crooked Creek in approximately 1987. FO6 staff investigated Mr. Chalupa's complaint and by letter to Mr. Chalupa dated March 17, 2009 informed him that the DNR would not require any corrective action by Mr. Chalupa's neighbor. This letter also directed Mr. Chalupa to remove his levee as previously required by April 30, 2009.

4. By letter dated September 22, 2009, FO6 again notified Mr. Chalupa that his levee expansion violated Iowa law and directed him to remove it as previously directed by November 16, 2009. Mr. Chalupa was also advised that failure to comply with this directive would result in referral to DNR's Legal Services Bureau for enforcement action, including assessment of a civil penalty of \$500 per day of violation. Mr. Chalupa visited the FO6 office on November 16, 2009 and asserted that he should not be required to remove the levee expansion because DNR's flood plain section had not looked at his property. In response to Mr. Chalupa's request for advice on what he should do, FO6 advised him to begin work so that he could comply with the November 16, 2009, deadline.

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<sup>1</sup> The 190 foot separation was required as part of a 1980 Washington County project that replaced the Sockum Ridge Road bridge over West Fork Crooked Creek. The separation was required to eliminate any obstruction to flood flow as it exits the bridge opening.

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5. FO6 staff inspected the Chalupa property on December 1, 2009 and observed that a 50 foot long section of the unauthorized levee had been removed. When contacted by FO6 staff on January 19, 2010 concerning the need to continue removing the unauthorized levee extension, Mr. Chalupa stated he would do so as weather conditions allowed.

6. FO6 staff inspected the Chalupa property on March 16, 2010, and observed some erosion and mud flats due to high water in the adjacent ditch but otherwise observed no further progress on removal of the unauthorized levee extension.

7. On April 12, 2010, FO6 staff met with Mr. Chalupa at the site. Mr. Chalupa requested guidance on how to protect his property from erosion if the levee was removed. FO6 staff agreed to consult with its flood plains section in Des Moines and upon doing so learned that Mr. Chalupa had already been advised that rip-rapping is the common method of addressing the erosion issue.

8. Following a 2 inch overnight rainfall FO6 staff visited the Chalupa site on May 13, 2010, and observed that water from the ditch had flowed onto Mr. Chalupa's adjacent field. FO6 staff telephoned Mr. Chalupa on May 24, 2010, and directed him to remove more of the unauthorized levee extension. Mr. Chalupa refused to do so and requested that the FO6 supervisor observe the site. On June 16, 2010, FO6 staff, including the supervisor, visited the Chalupa property and observed that the entire area was under water.

9. By letter dated September 17, 2010, FO6 again notified Mr. Chalupa that his levee extension violated Iowa law and directed him to remove it as previously directed by November 29, 2010. Mr. Chalupa was also advised that failure to comply with this directive would result in referral to DNR's Legal Services Bureau. Mr. Chalupa responded by visiting the FO6 office on September 29, 2010, and stated that he would not remove the unauthorized levee extension because a levee had been there previously and because his neighbor was not required to remove work he did 20-25 years ago.

10. On December 3, 2010, FO6 staff again visited the Chalupa property and observed that Mr. Chalupa had not complied with the requirement in its September 17, 2010 letter to remove the unauthorized levee extension by November 29, 2010. By letter dated December 7, 2010, FO6 informed Mr. Chalupa that his case was being referred to the DNR's Legal Services Bureau for enforcement action due to his failure to comply with the directives in its September 17, 2010 letter.

#### **IV. CONCLUSIONS OF LAW**

1. Iowa Code §455B.275(3) requires that approval be obtained from the DNR if a person desires to construct or maintain an obstruction or deposit on any floodway or flood plain as defined in Iowa Code §455B.261. Iowa Code §455B.275(1) prohibits the erection, use or maintenance of obstructions or deposits on the floodway or flood plain which adversely affect the efficiency of or unduly restrict the capacity of the floodway and declares them to be public nuisances.

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2. Iowa Code §455B.275(8) requires the Environmental Protection Commission (EPC) to establish regulatory thresholds by administrative rules. The regulatory thresholds are set forth in 567 IAC Chapter 71. More specifically, 567 IAC 71.4 and 71.12(2) require DNR approval for the construction, operation and maintenance of levees or dikes, and miscellaneous structures, obstructions or deposits on the floodway or flood plain of any river or stream draining more than ten square miles in rural areas.

3. The above-summarized facts establish that the foregoing statutory and rule provisions have been and are being violated and support the additional conclusion that the deposits and obstructions described herein constitute a public nuisance.

**V. ORDER**

THEREFORE, the DNR orders and Douglas Chalupa agrees to do the following:

1. Within 60 days of receipt of this Order remove all portions of the levee on his property along and parallel to the Sockum Ridge Road ditch as further described in this paragraph. The levee must be removed to natural ground elevation and the removal must commence at the westward base of the old levee along West Fork Crooked Creek and proceed westward to a point 190 feet from the west bank of West Fork Crooked Creek.

2. Pay an administrative penalty of \$3,000.00 in accordance with the payment schedule on page 6 of this Order. If any of the payments are not received in accordance with the payment schedule the remaining penalty balance shall be due and payable immediately.

**VI. PENALTY**

1. Iowa Code §455B.279(2) authorizes the assessment of civil penalties of up to \$500.00 per day per violation of flood plain laws, rules or permits.

2. Iowa Code §455B.109 authorizes the EPC to establish by rule a schedule of civil penalties up to \$10,000.00 which may be assessed administratively. The Commission has adopted this schedule with procedures and criteria for assessment of penalties; 567 IAC Chapter 10. Pursuant to these provisions the DNR has determined that the most effective and efficient means of addressing the above-cited violations is the issuance of an Order with a penalty of \$10,000.00. The administrative penalty is determined as follows:

a. Economic Benefit. Mr. Chalupa has enjoyed long term financial savings by proceeding with unauthorized flood plain construction. However, Mr. Chalupa will incur significant costs by removing the levee as required in this Order. Therefore, no amount is assessed for this factor.

b. Gravity of the Violation. One of the factors to be considered in determining the gravity of a violation is the amount of penalty authorized by the Iowa Code for that type of violation. As indicated above, moderate civil penalties are authorized by statute. Further, the integrity of the flood plain regulatory program is threatened in that Mr. Chalupa's actions encourage others to disregard approval requirements. Unauthorized flood plain construction and maintaining that

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construction has persisted for more than 5 years after the DNR directed Mr. Chalupa to remove the unauthorized levee extension. Therefore, \$1,500.00 is assessed for this factor.

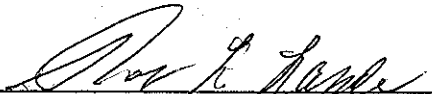
c. Culpability. Mr. Chalupa has been repeatedly notified that his levee extension violates Iowa law and required to remove it but he has persisted in refusing to comply. Therefore, \$1,500.00 is assessed for this factor.

**VII. WAIVER OF APPEAL RIGHTS**

This administrative consent order is entered into knowingly and with the consent of Douglas Chalupa. For that reason Douglas Chalupa waives the right to appeal this Order or any part thereof.

**VIII. NONCOMPLIANCE**

Compliance with Section V of this Order constitutes full satisfaction of all requirements pertaining to the violations described in this Order. Failure to comply with this Order may result in the imposition of additional administrative penalties pursuant to an administrative order or referral to the Attorney General to obtain injunctive relief and civil penalties pursuant to Iowa Code §455B.279.

  
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ROGER L. LANDE, DIRECTOR  
IOWA DEPARTMENT OF NATURAL RESOURCES

Dated this 28th day of  
September, 2011.

  
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DOUGLAS CHALUPA

Dated this 23 day of  
Sept., 2011.

Field Office 6; Randy Clark; Paul Brandt; EPA; III A.1

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**PAYMENT SCHEDULE**

The penalty of \$3,000.00 shall be paid in accordance with the following payment schedule. If any of the payments are not received in accordance with this payment schedule the remaining penalty amount shall be due and payable immediately.

\$500.00 due November 1, 2011

\$500.00 due May 1, 2012

\$500.00 due January 1, 2012

\$500.00 due July 1, 2012

\$500.00 due March 1, 2012

\$500.00 due September 1, 2012